IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

OCTOBER TERM, 1978
No. 78-151

RALPH E. MUELLER and EUGENE D. DEVANE,
Petitioners,

v.

HUBBARD MILLING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The Memorandum and Order of the district court denying Respondent's motions for judgment n.o.v. and for a new trial are set forth in App. A of the Petition. The opinion of the Eighth Circuit Court of Appeals (App. B of the Petition) is reported at 573 F.2d 1029 (8th Cir. 1978).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

(1) Whether the court of appeals may vacate judgments based upon jury verdicts and remand for a new trial because those verdicts were legally excessive, were irregular on their face, and were contrary to the instructions of the district court.

(2) Whether the court of appeals may vacate judgments based upon jury verdicts and remand for a new trial because of prejudicial error committed by the district court.

Statutes Involved

There are no significant Federal statutes involved in the Petition.

Statement

This litigation concerns two experienced investors, Petitioners Ralph E. Mueller ("Mueller") and Eugene D. Devane ("Devane"), who invested as limited partners in eight separate cattle feeding limited partnerships in which the Respondent, Hubbard Milling Company ("Hubbard"), served as the general partner. Mueller and Devane sustained losses in two of these limited partnerships, Dakota #14 and Dakota #16, during the unforeseen downward economic cycle of the cattle feeding industry which began in late 1973 and continued throughout 1974. They brought suit against Hubbard seeking recovery of their losses in Dakota #14 and

Dakota #16 under 12 separate claims for relief. The case was tried to a jury before the Honorable Earl R. Larson, U.S. District Judge, on four separate theories of liability: violation of Section 10b of the Securities Exchange Act of 1934 (15 U.S.C. §78j), and Rule 10(b)(5)(c) (17 C.F.R. §240.10b-5), common law misrepresentation, breach of oral contract, and breach of fiduciary duty.

During the trial, Hubbard objected *inter alia* to the district court's admitting into evidence certain testimony by Mueller regarding alleged oral conversations between himself and John McNeal, a Vice President of Hubbard, that varied the terms of, and were inconsistent with, the Dakota #14 and Dakota #16 written partnership agreements that had been executed by the parties. After overruling Hubbard's parol evidence objection generally, the district court also denied Hubbard's request for an instruction limiting the admissibility of the parol evidence to the fraud claims only.[1]

Initially, and during argument upon Hubbard's parol evidence objection, Petitioners' trial counsel focused on Section 10b and common law fraud as the primary legal theories relied upon for a recovery. That focus was significantly shifted to the breach of oral contract and fiduciary duty claims by the time the case was submitted to the jury. (*See* discussion at p. 14, *infra.)* Hubbard requested, but the district court refused to submit, special verdict forms to the jury. Thus, the general verdicts returned by the jury may have been predicated upon any of the legal theories advanced by the Petitioners.

The jury returned general verdicts in favor of Mueller and Devane for Dakota #16 that vastly exceeded the amounts

[1] *See* discussion at p. 4, *infra.*

they sought, and were not sustainable under any of their legal theories or the district court's damage instructions. The jury also wrote in handwriting on the Dakota #16 general verdict forms "plus damages of $51,000" for Mueller, and "plus damages of $9,000" for Devane. The total damages awarded on Dakota #16 exceeded by $219,295 the maximum permissible recovery under any of the plaintiffs' theories.[2]

Mueller Maximum #16	Jury Award	Extra Damages Inserted on Verdict Form by Jury	Total	Amounts by Which Jury Award Exceeded the Maximum Permissable Recovery
$219,300	$354,700	$51,000	$405,700	$186,400
Devane Maximum #16				
$ 38,700	$ 62,595	$ 9,000	$ 71,595	$ 32,895
TOTAL:				$219,295

On appeal, the Eighth Circuit Court of Appeals (*Van Oosterhout*, Senior Circuit Judge, Lay and Stephenson, Circuit Judges) reversed and remanded for a new trial on the following grounds:

1. The district court's prejudicially erroneous admission, over Hubbard's timely parol evidence objection, of Mueller's testimony that varied the terms of, and was inconsistent with, the written partnership agreements between the parties.[3]

[2]The jury verdicts for Dakota #16 in relation to the maximum permissable recoveries were as follows:

[3]Although the parol evidence was arguably admissible if limited to the fraud claims, the Eighth Circuit Court concluded that the general verdicts returned by the jury may rest only upon the oral contract claims which were "tainted with the trial court's erroneous and prejudicial admission of parol evidence." 573 F.2d at 1038. The Eighth Circuit Court emphasized the importance of Hubbard's requesting, and thus preserving, a limiting instruction that the parol evidence which varied the terms of the partnership agreements be limited to the fraud claims:

> The importance of Hubbard's request for a limiting instruction and of the trial court's refusal to give it cannot be over-emphasized. The result we reach might be different if Hubbard had not made the request or if the trial court had granted it. 573 F.2d at 1034, n. 7.

2. The legally excessive and irregular jury verdicts which were based on the demonstrable bias, passion, and prejudice of the jury.

Petitioners' certiorari petition presents no significant Federal or Constitutional issue. The resolution of this case by the Eighth Circuit Court turns on erroneous evidentiary rulings of the district court *and* the improper conduct of the jury in rendering the general verdicts which were vacated. The power of an appellate court to review decisions for legal error, and to grant new trials for such error, is so well established that citation of authority is unnecessary. This power includes the authority of an appellate court to reverse because of the district court's improper admission or exclusion of evidence, and to order a new trial where the trial court's ruling was prejudicial. 6A *Moore's Federal Practice* ¶ 59.08[2] (2d ed. 1948). This case represents a legitimate exercise of that appellate court power by the Eighth Circuit Court.

ARGUMENT

Introduction

In their attempt to convince this Court that this routine case raises issues of such outstanding significance that certiorari should be granted, the Petitioners have recast the holding of the Eighth Circuit Court.

Petitioners urge review by this Court based upon three separate alleged matters:

(1) The Eighth Circuit Court depriving Petitioners of their Seventh Amendment right to trial by jury by substituting its judgment as to the integrity of the jurors for that of the district court's purportedly contrary "finding" under Rule 52(a) of the Federal Rules of Civil Procedure.[4]

(2) The Eighth Circuit Court deciding the parol evidence issue under the substantive law of South Dakota rather than Minnesota.

(3) The Eighth Circuit Court disputing the jurors' resolution of witness credibility issues.

Petitioners argue that point (1), above, constitutes a Seventh Amendment Federal Constitutional issue and conflicts with court of appeals' decisions in other circuits. They urge that, while points (2) and (3) above do not concern Federal constitutionality, the Eighth Circuit Court's actions with respect to those issues conflict with the decisions in other circuits. As will be demonstrated herein, Petitioners

[4]The district court *did not* make a finding of fact under Rule 52(a) of the Federal Rules of Civil Procedure in its Memorandum Opinion denying Hubbard's alternative post-trial motion for a new trial and judgment n.o.v. Rule 52(a) provides, in relevant part:

> In all actions tried upon the facts *without a jury* or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless clearly erroneous. . . . (emphasis added)

Here, the action was tried upon the facts *to a jury* and not to the district court. Thus, Rule 52(a) has no application whatsoever to the instant action. Petitioners mistakenly attempt to convert a statement in the district court's memorandum opinion into a Rule 52(a) finding of fact. Moreover, "[a] memorandum opinion is not a decision. Although it may purport to decide issues in the case, it is merely an informal statement of the views of the trial judge. It *does not constitute findings of fact.*" *Taormino v. Denny*, 83 Cal. Rptr. 359, 362, 463 P.2d 711, 714 (1970) (emphasis added)

are mistaken on all three points. There is no valid reason for the Court to grant certiorari in this case.

THE PETITIONERS' SEVENTH AMENDMENT CLAIM IS WITHOUT MERIT

A. The Eighth Circuit Court's Reversal of Judgments Based Upon Legally Excessive Jury Verdicts and Remand for a New Trial Does not Violate the Seventh Amendment.[5]

As to Petitioners' point (1), it is clear that the Eighth Circuit Court's alternative basis for reversing and remanding for a new trial, *i.e.*, the judgments entered pursuant to the excessive jury verdicts were irregular on their face, did not violate Petitioners' Seventh Amendment right to a jury trial. Petitioners have not cited, and Respondent has not found, a single case in which this Court or any court of appeals has held that a reversal of a jury verdict accompanied by a remand for a new trial constituted a violation of the Seventh Amendment right to trial by jury.

The Seventh Amendment provides:

> no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[5]Petitioners' Seventh Amendment argument focuses upon the Eighth Circuit Court's second alternative ground for reversal, *viz.* the excessiveness of the jury's verdicts. The initial ground for reversal, *viz.* the district court's prejudicial error in receiving parol evidence does not raise any Seventh Amendment arguments and is dealt with in connection with Petitioners' point (2) at p. 13.

In interpreting the Seventh Amendment, this Court has held that when a trial by jury has been had:

> the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, *no other mode of re-examination is allowed than upon a new trial,* either granted by the court in which the first trial was had or to which the record was returnable, or *ordered by an appellate court for error in law;* and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise in any court of the United States. *Capital Traction Co.* v. *Hof,* 174 U.S. 1, 13 (1899). (emphasis added)

Here, the Eighth Circuit Court reversed and remanded for a new trial because of the district court's errors of law, not because the court of appeals sat as a fact finder or disagreed with the jury's verdict as the Petitioners contend. (*See* discussion at p. 16, *infra.*)

Petitioners' Seventh Amendment argument has been considered in detail in numerous appellate court opinions. All 11 circuit courts of appeals, and virtually all state courts of last resort, recognize that they may, consistent with the Seventh Amendment, reverse a judgment even though the only basis for review is the inadequacy or excessiveness of the verdict.[6] Certiorari has been routinely denied in numerous cases raising this identical issue. (*See, e.g.,* cases referenced in n.6.

[6]The cases so holding for each of the circuits are collected in C. Wright and A. Miller, 11 *Federal Practice and Procedure* §2820, n.84 (1973); 6A Moore's *Federal Practice* §59.08[6], n.67 (2d ed. 1948). The state court cases are collected in *Dagnello* v. *Long Island R.R. Co.,* 289 F.2d 797 (2d Cir. 1967).

In a leading and often cited decision on the point, *Dagnello* v. *Long Island Railroad Co.,* 289 F.2d 797 (2d Cir. 1961) (Medina, J.), the court held that the standard for appellate review of excessive jury verdicts is:

> whether the amount is so high that it would be a denial of justice to permit it to stand . . . [T]here must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, *but a question of law.* (289 F.2d at 806) (emphasis added)

Similarly, in *Solomon Dehydrating Co.* v. *Guyton,* 294 F.2d 439 (8th Cir.), *cert. denied,* 368 U.S. 929 (1961), a case relied upon by Petitioners, the Eighth Circuit Court stated that:

> an appellate court may review as a *question of law* whether the trial court abused its discretion in refusing to set aside a verdict for excessiveness. (294 F.2d at 446) (emphasis added)

In excessive verdict cases such as this case, the district court's error of law is its failure, at the trial court level, to grant the motion for a new trial. The result of the appellate court's reversal and remand is a correction of that error. All circuit courts of appeals, including the Eighth Circuit Court here, apply a strict standard of review of excessive jury verdicts. Thus, the clear standard for appellate review of excessive jury verdicts is whether the jury award exceeds the amount *any* reasonable man could feel claimant is entitled. This is the standard applied by the Eighth Circuit Court, and that standard has been applied in other cases that have considered the issue. *See, e.g., Bridges* v. *Groendyke Transport, Inc.,* 553 F.2d 877, 880 (5th Cir. 1977).

Moore's Federal Practice Treatise states the correct general legal rule:

> It is quite clear that a judgment may be reversed for any prejudicial *error of law*. Thus, *where the verdict . . . is more or less than an undisputed amount, . . .* or *is more than the admitted maximum amount,* or where the excessiveness or inadequacy is apparently due to other legal error committed at the trial—such as the erroneous admission or exclusion of evidence or erroneous instruction—*a failure of the trial court to grant appropriate relief on the motion for a new trial will be considered an error of law and the appellate court will order a new trial.* When the verdict is in clear contravention of the court's instructions or is the result of passion or prejudice on the jury's part an appellate court will reverse for legal error. 6A Moore's *Federal Practice* ¶ 59.08[6], 59-175—76 (2d ed. 1948) (emphasis added)

In a footnote to the above quote, Professor Moore observes:

> [I]f the maximum amount of the damages is undisputed, any verdict for more than that amount *is in legal error. Id.* at n.40. (emphasis added)[7]

Long-standing precedent in the Eighth Circuit Court compelled a reversal and remand for a new trial. In *Glenwood*

[7]Petitioners' reliance on *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933) is misplaced. An analysis of the *Fairmount* decision is found in 6A *Moore's Federal Practice* ¶ 59.08[6] at 59-177—80. Professor Moore points out that the implications of *Fairmount* are that:

> Where the verdict exceeds or is less than an undisputed amount, where it is in clear contravention of the court's instructions, or the excess or inadequacy is due to legal error committed at the trial, and in related situations where it can be seen that the verdict is the result of legal error, the refusal of the trial court to grant appropriate relief on a motion for new trial still amounts to legal error that is reviewable by an appellate court. (6A Moore's *Federal Practice* at 59-179)

Irrigation Co. v. *Vallery*, 248 F. 483 (8th Cir. 1918) and *United Press Associations* v. *National Newspapers Association*, 254 F. 284 (8th Cir. 1918), the Eighth Circuit Court stated that where: "[t]he jury not only disregarded the undisputed evidence in the case, but also the charge of the court" (254 F. at 286), the jury verdict must be reversed and a new trial ordered because such verdicts are an "error of law." (248 F. at 484)[8]

B. The Verdicts Herein Were Legally Excessive.

Unlike many, if not most, of the excessive jury verdict cases where the jury is at liberty to exercise reasonable discretion in awarding the plaintiff an amount for general damages, here the jury had no such discretion. No issue of *whether* the verdicts were excessive is present here. They were. Petitioners concede that the verdicts were clearly excessive and were so *as a matter of law*.[9] Clearly, a jury's discretion in awarding damages must end when the maximum legal recovery has been grossly surpassed. At that point,

[8]In 1889, this Court, in *Arkansas Valley Land and Cattle Co.* v. *Mann*, 130 U.S. 69 (1889) held that: "where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court. . . ." the remedy of remittitur cannot be permitted "[W]here such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding." (130 U.S. at 856)
The remittitur granted by the district court was done *sua sponte*, and not at Hubbard's request. In any event, the granting of a remittitur here was an obviously ineffective means of correcting the prejudicial error that occurred, for that error was inherent in and permeated the general verdicts and could not be isolated and corrected merely by reducing the Dakota #16 verdicts.

[9]It is undisputed that the maximum amount of damages permissible for Mueller was $219,300 and for Devane was $38,700. *See* discussion at p. 3, *supra*.

passion and prejudice of the jury in rendering an excessive award must be presumed.

The Eighth Circuit Court agreed with this indisputable proposition and held that the large excess of the verdicts in itself "and the absence of any plausible explanation therefor clearly points to bias and prejudice on the part of the jury." (A-29) Its opinion noted that its conclusion of bias and prejudice by the jury was strengthened by the jury's further award of damages added in writing to the Dakota 16 verdict forms of "plus damages of $51,000" for Mueller and "plus damages of $9,000" for Devane. (A-29) These extra awards of "plus damages" clearly evidence the jury's clear disregard of the Court's instructions[10] and the evidence.[11]

Where the jury inserted extra amounts of damages in the verdict forms which were contrary to the verdict forms; where the jury disregarded the court's instructions and the evidence on damages; and, where a jury's verdict is contrary to the weight of the evidence; then a new trial must be granted to avoid a miscarriage of justice.[12]

[10]The District Court instructed the jury that the damages with respect to Dakota #16 were: "[a]n amount sufficient to place the plaintiffs in as good a position as they would have been had they not entered into the transaction." (Tr. 1176)

[11]In his closing argument to the jury, Petitioners' trial counsel reviewed the evidence and stated:

> On Dakota 16 the losses of Ralph Mueller are . . . $219,300. That's Ralph Mueller's damages on Dakota 16. There is no question that he lost every penny of it.
>
> Then Gene Devane again lost every penny that he put in on Dakota 16. $38,700.
>
> That's, we submit, what the verdict should be for Gene Devane on Dakota 16. (Tr. 1149)

PETITIONERS' CHOICE OF LAW CLAIM DOES NOT RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW

As to Petitioners' point (2), they contend this case is worthy of certiorari because the Eighth Circuit Court decided the parol evidence issue under the substantive law of South Dakota, rather than Minnesota. This Court considered this issue just two years ago in *Singleton* v. *Wulff*, 428 U.S. 106 (1976), and reiterated the general rule with respect to those questions to be resolved for the first time on appeal:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left *primarily to the discretion of the court of appeals*, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as *where the proper resolution is beyond any doubt* . . . or where 'injustice might otherwise result.' (428 U.S. at 121) (emphasis added)[13]

The Eighth Circuit Court did not abuse its discretionary power in resolving the parol evidence issue under South Dakota rather than Minnesota law. The proper resolution of that issue in this case is beyond doubt.

[12]Regardless of the rhetoric used ['clear weight,' 'overwhelming weight,' 'great weight' of the evidence] *the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred." Fireman's Fund Ins. Co.* v. *Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) (emphasis added) *(See also Chicago, Rock Island and Pac. R.R.* v. *Speth*, 404 F.2d 291, 295 (8th Cir. 1968).

[13]In view of the fact that this Court examined this issue so recently, there is no apparent reason to re-examine it again.

Moreover, regardless of which forums' parol evidence rule applies, Mueller's testimony regarding alledged prior or contemporaneous oral conversations with Hubbard's representatives was directly contrary to the written partnership agreements between the parties, and therefore should have been excluded in any event, at least with respect to Petitioners' oral contract and breach of fiduciary duty claims. This is particularly true in view of Petitioners' attorney's statement in his closing argument that:

> Our *principal focus* has been on the contract claims, the promises that John McNeal made . . . . (Tr. 1143) (emphasis added)

As the Eighth Circuit Court's opinion noted, Petitioners' oral contract claims were based upon alleged oral "promises" that Mueller testified were made to him by McNeal *prior* to the execution of both the Dakota #16 limited partnership agreement and the Dakota #14 supplementing memorandum. (573 F.2d at 1036-37) These alleged oral conversations undeniably varied the terms of the written agreements between the parties.[14] Mueller's testimony, over Hubbard's timely objection, was a clear violation of the parol evidence rule of either Minnesota or South Dakota.

[14]In Dakota #16, Mueller testified that he had conversations with McNeal wherein McNeal agreed to call Mueller before any cattle were purchased for Dakota #16, "if they were above the 45-cent projected breakeven range." (Tr. 73) This alleged oral agreement is inconsistent with and directly contradictory to the terms of the Dakota #16 written agreement which states that the partnership "shall purchase" 2,000 cattle, and provides that Hubbard is vested with exclusive management of the partnership. In Dakota #14, Mueller testified that on December 26, 1973, McNeal stated he would "really watch out for us" and "would take care of the situation" so that Mueller and Devane would not lose more than $100 per head. (Tr. 105) This conversation is directly contrary to the Dakota #14 supplementing memorandum which states that Hubbard will use its "best efforts" to hold losses to $100 per head by advance contracting certain pens of cattle "when futures prices fall" to prices set forth in the guidelines of the memorandum.

Minnesota applies the parol evidence rule as vigorously to partnership agreements as to all other contracts. *Walker v. Patterson,* 166 Minn. 215, 226-27, 208 N.W. 3 (1926). Nor can plaintiffs evade the parol evidence rule by characterizing the alleged conversations as fraud. In *Henvit v. Keller,* 218 Minn. 299, 15 N.W.2d 780 (1944), the court recognized that to disreard the parol evidence rule and modify written contracts whenever alleged oral statements were called "fraudulent," would deprive the rule of all meaning and written contracts of all force:

> Were the law otherwise . . . there would be an absurd futility in written contracts which it is the purpose of the parol evidence rule to prevent . . . . It is reasoning in a circle, to argue that fraud is made out, when it is shown by oral testimony that the obligee, contemporaneously with the execution of a bond, promised not to enforce it. Such a principle would nullify the rule [excluding parol evidence]: for conceding that such an agreement is proved, or any other contradicting the written instrument, the party seeking to enforce the written agreement according to its terms, would always be guilty of fraud . . . . For reasons founded in wisdom and to prevent frauds and perjuries, the rule of the common law excludes such oral testimony of the alleged agreement. (218 Minn. at 302-3, 15 N.W. at 782)

The district court permitted Mueller to testify that, although he "agreed in writing to one thing," he meant another. (Tr. 105, 238) Under the parol evidence rule of *either* Minnesota or South Dakota, Mueller should not have been allowed to testify as he did. If the written agreements were unacceptable to Petitioners, they could have refused to sign them. *Klawitter v. Straumann,* . . . . Minn. . . . .,

255 N.W.2d 407, 411 (1977). Thus, even if the Eighth Circuit Court had resolved the parol evidence issue under Minnesota, and not South Dakota, substantive law, the result should have been the same.

THE PETITIONERS' CLAIM THAT THE EIGHTH CIRCUIT COURT DISPUTED THE JURORS' RESOLUTION OF CREDIBILITY ISSUES MISCONSTRUES THE COURT'S ACTIONS AND DOES NOT RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW

As to Petitioners' point (3), they argue that the Eighth Circuit Court disputed the jurors' resolution of credibility issues, and that such action conflicts with decisions of other circuits and constitutes a substantial departure from accepted judicial practice. The Petitioners' argument proceeds from a mistaken premise.

First, the Eighth Circuit Court did not reverse the jury verdicts *because* they disagreed with the jurors' factual determinations. As previously noted, the Eighth Circuit Court reversed and remanded because of: (1) the district court's erroneous admission of Mueller's testimony in violation of the parol evidence rule, and (2) the legally excessive and irregular jury verdicts which could not be corrected by remittitur.

Second, the very fact that an appellate court, in reviewing a trial court's conduct of a trial, makes certain judgments about testimony erroneously received in evidence and the magnitude of the prejudice resulting to the objecting party, does not mean that the appellate court has substituted its judgment as to the credibility of a witness whose testimony was erroneously received in evidence for

that of the jurors. The well-recognized fact that testimony erroneously received often is believed by jurors serves as the cornerstone of, and justifies, the appellate court's scrutiny. When that scrutiny results in the conclusion that prejudicial error has resulted which is incapable of correction on the record presented, as is here the case, the only remedy to right that error is to reverse and remand for a new trial. The error that is corrected in the process is the trial court's failure to grant a new trial itself. Petitioners' contention, if accepted, would vitiate this very fundamental aspect of appellate review. *See Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 186 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).

Finally, the Eighth Circuit Court did not, and has not, decided such factual issues as credibility of witnesses. The case is remanded for a new trial where Petitioners will have an opportunity to present their claims wtihout Mueller's legally inadmissible parol evidence for the jury's determination.[15]

[15]If the Eighth Circuit Court had followed the urging of Hubbard, it would have reversed outright the judgments entered pursuant to the improper jury verdicts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Dated: August 25, 1978.

Respectfully submitted,
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